

IN THE MATTER OF TAIPAN RESOURCES NL (No 7)

These are the reasons for our decision to refuse the application of Taipan Resources NL under section 657C of the Corporations Law received on 15 December 2000 for an interim order under section 657E and a declaration of unacceptable circumstances and final orders under sections 657A and 657D in relation to a takeover bid by Troy Resources NL.

REASONS FOR DECISION

INTRODUCTION

1. The Panel in this matter is constituted by Professor Ian Ramsay (sitting President), Peter Cameron (sitting Deputy President) and Trevor Rowe.
2. These are the reasons for our decision to refuse to make an interim order under section 657E of the Corporations Law (the **Law**) and a declaration of unacceptable circumstances and final orders under sections 657A and 657D in relation to a takeover bid by Troy Resources NL (**Troy**). The decision was made on 22 December 2000 in response to an application by Taipan Resources NL (**Taipan**) under section 657C dated 15 December 2000.¹

BACKGROUND

3. Troy announced takeover bids on 19 September and 21 September for all of the fully and partly paid shares in Taipan (the **Original Bid**). The Original Bid was subject to a precondition that offers under the bid would only be made if the proposed merger between Taipan and St Barbara Mines Limited (**St Barbara**) by scheme of arrangement did not proceed.
4. On 2 November, Troy obtained an ASIC exemption from section 631(1) to allow it to make offers under the Original Bid on the condition that Troy include a non-waivable defeating condition to the effect that the Court not approve the merger with St Barbara (the **Defeating Condition**). Troy lodged and served its bidder's statement on 2 November and sent offers to Taipan shareholders on 17 November, which included the Defeating Condition required by ASIC.

¹ Statutory references are to provisions of the Corporations Law, as in force at 22 December 2000. Findings of fact are based on submissions by the parties and announcements to Australian Stock Exchange Limited.

5. On 27 November, Troy applied to ASIC for a variation of the ASIC exemption granted on 2 November to allow it to waive the Defeating Condition. On 5 December, ASIC refused Troy's application.
6. Troy subsequently applied to the Panel for a review under section 656A of the ASIC decisions of 2 November and 5 December, firstly, to impose the Defeating Condition and, secondly, not to allow Troy to waive the Defeating Condition (the **Taipan 6 Application**). On 12 December, the Panel decided to affirm the ASIC decisions. In its decision and subsequent correspondence with the parties, the Panel noted:

In these circumstances, having regard to the observations by Taipan and St Barbara that Troy should make a fresh bid and to Troy's own submissions on acceptable terms for a revised bid, the Panel would not regard a new cash bid by Troy as unacceptable, merely because it did not include the Defeating Condition. If Troy made a new bid for Taipan the requirements set out in paragraph 9 above would be satisfied. To reduce confusion amongst Taipan shareholders,...

the present bid should close before a bidder's statement is served and buying (either on market or from acceptances) is possible under a new bid...

7. Paragraph 9 of the Panel's decision in the Taipan 6 Application noted that, had the Panel allowed Troy to waive the Defeating Condition, it would have required:
 - (a) *Troy to extend its current bid for a sufficient period of time to allow Taipan shareholders to assess the merits of the revised bid and to ensure that Taipan shareholders were not subjected to coercive time pressures in deciding whether or not to accept the bid;*
 - (b) *Taipan shareholders who have already accepted Troy's bid to have a reasonable time to withdraw their acceptances; and*
 - (c) *full and clear supplementary disclosure of Troy's intentions, including its intentions in relation to:*
 - (i) *representation on the Taipan board;*
 - (ii) *completion of the proposed merger between St Barbara and Taipan; and*
 - (ii) *the merged entity, if the merger proceeds.*
8. The offer period of the Original Bid was scheduled to close on 19 December. ASIC consented to the withdrawal of the Original Bid and withdrawal notices were sent to Taipan shareholders on 15 December.

As the Defeating Condition remained unsatisfied, Troy's Original Bid lapsed and all acceptances received by Troy under the bid were void under section 650G of the Law.

9. On 13 December, Troy announced that, as soon as possible after the Original Bid expired or was withdrawn, it intended to make an unconditional bid (except for prescribed occurrences) for all fully and partly paid shares in Taipan and otherwise on the same terms as the Original Bid (the **New Bid**).
10. On 18 December, Troy lodged its bidder's statement under the New Bid. On 19 December, Troy commenced acquiring further shares in Taipan on-market under the exception in item 2 of section 611.

THE APPLICATION

11. Taipan's application is for a declaration of unacceptable circumstances in relation to the New Bid and final orders to the effect that:
 - (a) Troy be restrained from making its New Bid;
 - (b) alternatively, Troy be compelled to make its New Bid for all of the shares in the post-merger Taipan if the merger between Taipan and St Barbara goes ahead; and
 - (c) alternatively, Troy be prevented from acquiring Taipan shares on-market until both the bidder's statement and the target's statement have been dispatched to shareholders.
12. Taipan has also applied for orders that Troy be restrained from dispatching its bidder's statement until the Panel has determined the application and the Panel is satisfied that the terms of the bidder's statement are consistent with the Panel's previous decisions on applications by Taipan and Troy.²
13. In addition, Taipan has applied for an interim order that Troy be restrained from purchasing Taipan shares on-market until the application is determined by the Panel.
14. In summary, Taipan's application argued that unacceptable circumstances will arise if Troy makes the New Bid because:

² In addition to the decision of the Panel in the Taipan 6 Application, the reference by Taipan to previous decisions of the Panel includes the decision of the Panel in *Re Taipan Resources NL (No. 3)*, in which the Panel declined to make a final decision in relation to the adequacy of Troy's disclosure in its bidder's statement of its funding arrangements for the Original Bid.

- (a) in approving the merger, Taipan and St Barbara shareholders acted on representations made by Troy that it would not proceed with a takeover bid if the merger went ahead;
- (b) St Barbara shareholders are, in effect, “Taipan contingent shareholders” and Troy is not bidding for the shares that will be issued to St Barbara shareholders if the merger is approved; and
- (c) Troy will be allowed to purchase Taipan shares on-market immediately while the market is not fully informed of the changed circumstances.

INTERIM ORDER

- 15. On 18 December, we decided not to make the interim order requested by Taipan preventing Troy from acquiring Taipan shares on-market.
- 16. In making this decision, we noted the overlap of issues between this application and the Taipan 6 Application. We also noted that the sitting Panel in the Taipan 6 Application had concluded that Troy should be allowed to make a new unconditional bid for Taipan.
- 17. We were also satisfied that the Panel would have the power to make final orders that would adequately rectify any unacceptable circumstances that may arise if Taipan’s application was subsequently upheld. These orders could include the unwinding of on-market transactions if the circumstances justified such action.
- 18. Accordingly, we were satisfied that the balance of convenience was against granting an interim order to restrain Troy from buying Taipan shares on-market.

PRELIMINARY ISSUE

- 19. In paragraphs 3.13(e) and 5.3(c) of the application, Taipan sought relief from the Panel which would have required the Panel to review Troy’s new bidder’s statement and determine whether the terms of the bidder’s statement were consistent with the Panel’s previous decisions on applications by Troy and Taipan. Taipan did not allege any specific deficiencies in Troy’s new bidder’s statement.
- 20. On 19 December, we declined to consider Troy’s new bidder’s statement on the terms requested by Taipan.

21. In general, it will not be appropriate for the Panel to adopt a pre-vetting role in relation to bidder's statements or any other disclosure documents except in extraordinary circumstances. The Law provides a regime under which bidder's statements and other disclosure documents are lodged with ASIC and served on the other parties to the transaction. If a person affected considers that the disclosure in one of those documents is inadequate, the Panel will have jurisdiction to hear any ensuing complaint. This regime is not affected merely because there may have been inadequate disclosure in relation to a previous bid.³
22. We therefore advised the parties that the proper procedure to follow, if Taipan considers that Troy's disclosure in the bidder's statement is inadequate in any material particular, would be for Troy and Taipan to make a genuine attempt to negotiate a resolution before any further application to the Panel is made. Further, we noted that if, despite this, Taipan considered it necessary to make a further application, the application should arrive quickly after negotiations have failed and, if Taipan sought restraint of dispatch, well before the date that Troy would be able to dispatch the bidder's statement to shareholders.

SUBSTANTIVE ISSUES

Overlap with issues in Taipan 6 application

23. In considering the application, it was apparent that most of the issues raised by Taipan had also been raised by Taipan in the Taipan 6 Application. To the extent that the issues in this application were duplicative of the issues raised by the Taipan 6 Application, we have considered, and agree with, the decision and reasons of the sitting Panel in the Taipan 6 Application.
24. Accordingly, in these reasons we intend to deal only with those issues that were not raised in the Taipan 6 Application and are therefore not covered by the reasons for decision in the Taipan 6 Application.

"Taipan contingent shareholders"

25. Taipan submitted that Troy's bid should extend to shareholders of St Barbara, as they were "Taipan contingent shareholders". As Taipan and St Barbara shareholders had approved the merger between those two companies, the merger was only subject to approval by the Supreme

³ In *Re Taipan Resources NL (No. 3)*, Taipan claimed that Troy's disclosure of a number of matters in its bidder's statement for the Original Bid was deficient including the disclosure of its funding arrangements for the Original Bid and its intentions regarding a convertible note in Taipan. The Panel declined to make a final decision in relation to the adequacy of Troy's disclosure in relation to its funding arrangements.

Court of Western Australia. After the Court approval was obtained, St Barbara shareholders would become Taipan shareholders. Therefore, Taipan argued that the St Barbara shareholders should be regarded as shareholders in Taipan, contingent upon the Court approving the scheme.

26. Taipan's argument was based on the following:
 - (a) section 617 and the definition of "securities" in section 92(3) should be given a wide interpretation so as to include "Taipan contingent shareholders"; and
 - (b) as St Barbara shareholders are to be regarded as Taipan shareholders conditional upon Court approval, Troy's bid was contrary to the principle that all Taipan shareholders should have an equal opportunity to participate in the benefits flowing from the takeover bid by Troy.
27. Subsection 617(1) provides that a takeover bid must relate to securities:
 - (a) *in a class of securities (the **bid class**); and*
 - (b) *that exist or will exist as at the date set by the bidder under subsection 633(2).*
28. Subsection 617(2) provides that a takeover bid may extend to securities that come to be in the bid class as a result of the conversion or exercise of rights attached to securities that exist or will exist at the date set by the bidder under subsection 633(2).⁴
29. The definition of "securities" in paragraph 92(3)(d) includes "legal or equitable rights or interests in... shares". The word "*shares*" is not defined in the Law. However, we accept Troy's submissions that the correct interpretation of "*shares*" when used in paragraph 92(3)(d) is shares that exist at the relevant date. Therefore, this does not include shares that have not yet been issued.
30. This interpretation would also appear to be consistent with related parts of the definition of "*securities*" in subsection 92(3). In paragraph 92(3)(e), the definition of securities is expressly extended to options to acquire securities by issue. As paragraph 92(3)(e) refers to unissued securities, it follows that the context is narrow. Therefore, the other paragraphs of the definition will not include unissued securities unless this is expressly stated.

⁴ It is possible that securities in a company other than the target company may be convertible into, or confer rights to be issued, bid class securities. In this case, it is arguable that St Barbara shares have an (unperfected) right attached to them for holders to be issued Taipan shares subject to the approval of the scheme of arrangement by the Court.

31. Further, subsection 617(2) provides that a bidder may make an offer for shares that will come into existence on conversion of, or exercise of rights attached to, existing securities. This provision would be redundant if the definition of “*shares*” extended to shares which had not yet been issued. In addition, the provision would fail to limit a bidder’s ability to bid for unissued bid class securities.⁵
32. Indeed, if Taipan’s submissions were correct, this would result in several outcomes that would be anomalous with the operation of other provisions of Chapter 6 of the Law. For example, this would mean that, in certain circumstances, a bidder would be required to bid for shares which do not exist and would not come into existence during the bid period, and, in this case, may not come into existence at all. This is clearly not the intention behind the Chapter 6 provisions and would be contrary to the principle of efficiency contained in section 602.
33. We therefore do not accept Taipan’s submissions in relation to this issue.
34. Similarly, we do not accept that the failure of Troy to extend its bid to St Barbara shareholders constitutes unacceptable circumstances. In this regard, we accept Troy’s submission that the approval of the Supreme Court to the St Barbara scheme of arrangement is by no means a *fait accompli*.
35. Shareholders of Taipan and St Barbara (including Troy) are opposing the scheme proceedings and have raised issues that the Court may consider are sufficient for it not to approve the scheme. New circumstances may also arise before the scheme proceedings are heard that have significant bearing on whether the scheme is approved.
36. While we accept that some of the delay and uncertainty in the approval of the scheme is due to opposition by Troy, a number of other Taipan and St Barbara shareholders are also opposing the scheme. We also note that the scheduled hearing date for the scheme proceedings in mid-January has now been vacated at the request of St Barbara which means that there will be further delay. In circumstances where a scheme of arrangement is pending approval by the Court and there is opposition to the scheme, there is always a possibility that Court approval will be delayed or ultimately refused.
37. Accordingly, we do not consider that this is a situation where St Barbara shareholders should be regarded as “contingent” holders of bid class securities. Therefore, St Barbara shareholders are not entitled to be given an opportunity to participate in the benefits under Troy’s New Bid. However, we do not discount the possibility that a situation may arise

⁵ A bidder may apply to ASIC for relief under section 655A to allow it to bid for unissued securities that it would not otherwise be allowed to bid for under subsection 617(2).

where a class of persons who are entitled to become holders of bid class securities should be entitled to share in the benefits accruing to holders of the bid class under a takeover bid.

Taipan shareholders who sold on-market

38. Taipan submitted that one class of persons that would be adversely affected by Troy being allowed to make its New Bid were Taipan shareholders who sold on-market at less than the bid price of the Original Bid.
39. Taipan argued that these shareholders decided to sell their shares in reliance on representations made by Troy that it would not bid for Taipan if the merger with St Barbara was approved. As a result, these shareholders have suffered a loss by selling at a lower price than they would otherwise have done if they were aware that there was some possibility that Troy would bid for Taipan regardless of whether the merger was approved.
40. Taipan has not produced sufficient evidence to show that Taipan shareholders who sold their shares on-market for less than the bid price would have materially relied on the representations of Troy in deciding whether or not to sell their shares at a discount. There would have been a number of relevant considerations for a willing seller of Taipan shares at that time, including the fact that the future of Taipan, regardless of whether control was eventually obtained by St Barbara or Troy, was sufficiently uncertain to justify selling early at a discount to the bid price.
41. In addition, the resolution of all issues surrounding the proposed merger and Troy's takeover bid was likely to take some time. As a result, many investors may have been prepared to sell at a discount in order to reinvest elsewhere.
42. In any event, Taipan shareholders were not entitled to rely on Troy's representations in relation to its Original Bid as meaning that Troy would not in any circumstances make another takeover bid for Taipan. In our view, there was always the possibility of Troy or some other third party making such a bid if the merger approval proceedings were sufficiently delayed.

Information regarding the New Bid

43. Taipan's submissions argued that Troy should not be allowed to purchase Taipan shares on-market following service of its bidder's statement because the market and Taipan shareholders were not sufficiently informed of Troy's New Bid and the changes from the Original Bid.

44. On 13 December, Troy made an announcement to the effect that it would allow its Original Bid to lapse and that it intended to make a new cash bid for Taipan (conditional only upon prescribed occurrences) after the close of the Original Bid.⁶ Troy then sent notices of withdrawal to Taipan shareholders (with ASIC consent) under its Original Bid on 15 December.
45. Item 2 of section 611 allows a bidder to purchase shares in the target on-market during the bid period in excess of 20% if the bidder is making a takeover bid which is only subject to “prescribed occurrence” conditions. Under section 9, the bid period commences when the bidder’s statement is served on the target. Therefore, under the Law, a bidder is entitled to purchase shares in the target on-market in excess of the 20% limit once it has lodged its bidder’s statement with ASIC and given a copy to the target and the relevant securities exchange.⁷
46. In general, therefore, the announcement of the takeover bid and the provision of a copy of the bidder’s statement to the relevant securities exchange is considered to be adequate public information to allow the bidder to acquire the target’s shares on-market. In general, it is accepted that those shareholders who sell on-market before the bidder’s statement and target’s statement are sent to them are accepting the risks inherent in doing so.
47. We do not rule out the possibility that another Panel in the future may deem as unacceptable an acquisition of securities on-market made in reliance on this exception. This may occur if, despite the public takeover announcement and the availability of the bidder’s statement, there is a significant likelihood that the market will nevertheless be materially misled.
48. However, we do not consider that such circumstances exist in this case. Taipan shareholders have available to them information that Troy is making a new bid on substantially the same terms as the Original Bid except that the New Bid is not subject to the Defeating Condition. On 13 December they knew that Troy intended its Original Bid to lapse and they knew, from at least 19 December, that the Original Bid had in fact lapsed. From 19 December, they also knew that they could obtain a copy of the bidder’s statement from ASX. As such, they were in no worse position regarding the level of information available than would normally be the case in a takeover bid.

⁶ ASX Announcement, *Troy to make new offer for Taipan Resources NL*, 13 December 2000.

⁷ ASX imposes a short trading halt immediately after a takeover bid is announced.

Dispatch of bidder's statement and target's statement

49. Taipan submitted that the time for dispatch of the bidder's statement and target's statement should be altered to enable the two documents to be dispatched together. Alternatively, Taipan suggested that Troy's bidder's statement should be dispatched as soon as possible. Troy has indicated that it would be agreeable to either of these suggestions.
50. In this case, should the parties agree on a new timetable for dispatch of the bidder's statement and the target's statement, we consider that, to the extent that the Law does not allow sufficient flexibility, the proper course would be for the parties to apply to ASIC for the relevant relief.

DECISION

51. Under regulation 20 of the ASIC Regulations, we decided to conduct proceedings in this matter.
52. As noted above, we considered, and agree with, the decision dated 12 December made by the sitting Panel in the Taipan 6 Application to the extent that the issues overlap with this application. Although Taipan raises some new arguments in this application, we were concerned that many of the arguments raised by Taipan in this application were duplicated arguments that were raised by Taipan and not accepted by the Panel in the Taipan 6 Application. While we decided to conduct proceedings in this case, it may be appropriate for a sitting Panel (other than a review Panel) in the future to decline to conduct proceedings in relation to an application if enough of the issues raised have been previously considered and determined by a sitting Panel.
53. We have decided to refuse the application by Taipan for an interim order and a declaration of unacceptable circumstances in relation to the takeover bid by Troy.
54. We also note the Panel's concern at the serial and adversarial nature of the matters which have been brought before it by Troy and Taipan in relation to these transactions. The Parliament's intention in introducing the recent changes to the Panel's legislation was to reduce the incidence of tactical litigation in takeovers. The applications brought by the parties to these transactions so far place the parties at serious risk of breaching those intentions.
55. The Panel expects that parties will raise only material issues with the Panel, will make serious attempts to resolve issues with other parties before raising them with the Panel, and will provide responses to each other that are designed to resolve issues rather than give the minimum amount of information possible. The Panel is interested to resolve

material disputes between parties where genuine attempts at negotiation have failed and to ensure that it is not used for purely tactical purposes.

56. The application is therefore dismissed. We granted all parties leave to be represented by their solicitors. There will be no order for costs.

Ian Ramsay
22 February 2001